view, the correct approach is summed up admirably by Harman L.J. in *Re C(A) (an infant)*[6] as follows: —

"I can see nothing wrong in the consideration of the law which the learned judge applied. He did not, I think, give too much weight to the father's position. He looked, as he should, at the whole background and considered where had the infant better be — and that is really the only question that the court has to ask. I do not at all agree with expressions of opinion which have fallen, perhaps *per incuriam*, from judges that a boy should, as a matter of principle, be with his father — just as much as I disagree with the other 'principle' which has altogether been abandoned, that a girl of under three should, as a matter of principle, be with her mother. Other things being equal, these things may be so, but there is no principle involved in either. They are merely considerations which may weigh with the judge where the scales are nicely balanced."

In our judgment, having considered all the facts, both disputed and otherwise, the proper order to make was to reverse the order for custody made by the judge and order that the appellant should have such custody, including care and control over the child and responsibility for its upbringing. This would ensure that during his tender years he would have the benefit of being brought up by his own mother as opposed to being brought up in a haphazard way by others to whom the respondent might feel disposed to entrust his upbringing. We considered that this change would not affect him adversely as the judge thought but that it would be to his decided advantage in his formative years to be with his mother in all the surrounding circumstances.

Counsel for the respondent asked for joint orders for care and control to be given to both parents and for joint custody. It seemed to us to be absurd, having regard to the obvious bitterness and lack of cooperation prevailing between the divorced parties, to make any such orders. It did not appear to us that the relationship between the parties, culminating in the uncontested divorce proceedings founded on cruelty on the part of the respondent, was such as to make any order for joint custody workable or desirable. It could not be said that the respondent had shown himself to be an impeccable or unimpeachable parent whereas there were circumstances which clearly revealed that, if either parent was unimpeachable or less impeachable than the other, it was the appellant who had originally been forced to leave the matrimonial home and thereby to lose touch with her only child. We did not find that the circumstances as revealed by the affidavits herein showed any intention on her part to abandon him.

We should add that this court approved of the split order made in *Tey Leng Yeow* v. *Tan Poh Hing & Anor.*[7] where an appeal against such an order was dismissed.

We allowed the present appeal with costs and an order was made for the appellant to have custody as well as care and control of the infant, with access to the father as agreed between the parties *i.e.* from 1.30 p.m. on Saturday till 7.30 p.m. on Sunday each week. We also gave liberty to apply generally including the making of any application for maintenance of the child.

Appeal allowed.

Solicitors: *Drew & Napier; T. Q. Lim & Co.*

MALAYSIAN REPORTS

ITAM BINTI SAAD v. CHIK BINTI ABDULLAH

[O.C.J. (Syed Agil Barakbah J.) December 20, 1973]
[Alor Star — Civil Suit No. 171 of 1964]

Land Law — Contract for sale of land — Claim for specific performance — Conflicting equities — Administration of Estates Enactment No. 1 (Kedah), ss. 45 and 31.

This was an action for specific performance of an agreement for sale of land between the plaintiff and the defendant. The plaintiff sued as administratrix of her father's estate, her mother's estate as well as in her own right. The plaintiff had been in possession of the land for many years following possession previously of her late father-in-law and her late husband. The title deed had been in her possession since 1943. The land had been subject to two agreements for sale. The first agreement was made in 1943 between the plaintiff's late husband and the mother of the defendant who was the administratrix of her mother's estate, and the second made in 1948 was a written agreement between the plaintiff and the mother of the defendant. The plaintiff's claim against the defendant as administratrix of her mother's estate was for specific performance of the second agreement in 1948 and her claim against the defendant in her personal capacity was a declaration that the defendant was a trustee of the land for the plaintiff.

The court had to decide whether pursuant to section 45 of the Administration of Estates Enactment No. 1 (Kedah) it could grant permission so that a registrable transfer by sale be made in favour of the plaintiff.

Held: (1) taking into consideration the facts and surrounding circumstances and having regard to the long period of uninterrupted possession by the plaintiff, her possession of the document of title and paying of quit rents, the court ought and should grant permission for the transfer of the grant of title to be registered in the name of the plaintiff;

(2) the plaintiff's delay in bringing action for specific performance could not be held against her as she was in a sense the equitable owner;

(3) the defendant became a trustee of the plaintiff upon the death of the previous trustee, who was the mother of the defendant as the defendant was the administratrix of her mother's estate.

[Editorial Note: The defendant appealed and the Federal Court upheld the decision of Syed Agil Barakbah J. See [1974] 1 M.L.J. 221.]

Cases referred to:-

(1) *Haji Saud* v. *Haji Ahmad & Anor.* [1957] M.L.J. 50.
(2) *Haji Osman bin Abu Bakar* v. *Saiyed Noor bin Saiyed Mohamed* [1952] M.L.J. 37.
(3) *Williams* v. *Greatrex* [1957] 1 W.L.R. 31.
(4) *Peninsular Land Development Sdn. Bhd.* v. *K. Ahmad* [1970] 1 M.L.J. 149 at p. 151.

CIVIL SUIT.

A. Jayadeva for the plaintiff.

A. S. C. Hoe for the defendant.

Syed Agil Barakbah J.: The plaintiff sues the defendant in her capacity as the administratrix of the estate of one Abdullah bin Mohamed (deceased) and also in her personal capacity. The claim involves a piece of land comprised in Surat Putus No. 13380, Portion No. 354 situate in the Mukim of Gelong, District of Kubang Pasu, Kedah, in area of 0 relong 283 jembas 40 square feet (hereinafter referred to as "the said land"). The plaintiff's claim against the first defendant is for specific performance of an agreement in writing between the plaintiff and Mek binti Junus (deceased) dated May 29, 1948, for the sale of the said land by the latter as the administratrix, for damages

in lieu or in addition thereto, for further and other reliefs, and costs. Her claim against the second defendant is for a declaration that the second defendant is a trustee to the said land for the plaintiff or, alternatively, a declaration that the said defendant is bound to convey the said land to the plaintiff in accordance with the terms of the said agreement (hereinafter referred to as "the agreement").

The following facts are not disputed: —

The plaintiff is a padi planter residing at 14¾ milestone Jalan Perlis, Kampong Pulau Nyior, Mukim Gelong, Kubang Pasu, Kedah. The defendant is a duly constituted administratrix of the estate of Abdullah bin Mohamed (hereinafter referred to as "the said deceased") and is a padi planter residing in the same kampong. The said land was originally registered in the name of the said deceased. After his death sometime in 1926 his widow, Mek binti Junus, obtained letters of administration to the estate on January 27, 1927, and extracted the grant of letters of administration on April 26, 1928, issued by the Magistrate's Court, Jitra, Kubang Pasu, under section 19 of the Administration of Estates Enactment No. 1 (Kedah), (hereinafter called " the Enactment"). The grant of letters of administration was duly registered in the grant title in the Hijrah year 1346. (See pages 7 and 8 of Agreed Bundle of Documents, Ex. P1). The deceased had no male issue and was survived by Mek binti Junus, his widow, and his daughter Chik, the defendant. According to Shariah law of distribution the defendant was entitled to 7/16th share, her mother Mek to 2/16th share and the remaining 7/16th share went to Baitulmal. Upon the death of her mother on November 8, 1953, the defendant applied to the court, obtained grant of letters of administration *de bonis non* and extracted it on July 18, 1964, (see page 10 of Agreed Bundle, Ex. P1) without any objection by the plaintiff. A certificate of apportionment made by the Kadzi Daerah, Jitra, stated to the effect that the defendant is entitled to 9/16th share of the estate and the Baitulmal to 7/16th share. On June 29, 1964, an order of distribution was obtained by her from the High Court, Alor Star, to transmit the portion of her share as well as the Baitulmal share to herself on the payment of $22 to the Government on the latter share. The defendant made the necessary payment into court on July 11, 1964, thus becoming entitled to the whole property. Thereafter the defendant requested the plaintiff to hand over the title deed of the said land to her. When the plaintiff refused to do so the defendant served notices in writing on her, (see page 28 of Ex. P1) but the plaintiff refused to surrender the title deed. No further action was taken by the defendant.

The plaintiff, on the other hand, lodged a caveat against the said land on January 5, 1964, and in spite of notice on the part of the defendant to have it withdrawn, succeeded in obtaining its extension which subsisted until the completion of the proceedings.

The following facts have been proved on the balance of probabilities in favour of the plaintiff: —

(1) She has been in possession of the said land and enjoying the benefits thereof without any interruption from the defendant since the death of her husband Salim, prior to the execution of the said agreement with Mek. Before that her father-in-law, Jusoh, and on his death, her husband, Salim, was in occupation of the said land under similar circumstances. The plaintiff's evidence in this regard is corroborated not only by her witness Khoo Guat Inn (PW1) but also by the defendant's own witness Haji Taib (DW4). Earlier Jusoh built a house on the said land and rented part of the land to Khoo Guat Inn's husband who built a shophouse on it about 40 years ago. He had been paying rents to Jusoh and his son Salim until their deaths and thereafter to the plaintiff. Similarly, Haji Taib obtained the plaintiff's permission to construct a rice mill on the land and had been paying rents to her until the dispute between the plaintiff and the defendant which he unsuccessfully tried to settle. He knew that Jusoh and Salim during their lifetime were occupying the land.

(2) Although the title deed according to the plaintiff had been given by Mek to her father-in-law when they entered into an alleged oral agreement of sale of the said land, I hold that her evidence on the alleged agreement is inadmissible being hearsay and contravening section 32 of the Evidence Act, 1950, since she did not have any personal knowledge of it but heard from her husband. Nevertheless, I am satisfied that the title deed was handed by Mek to her husband Salim on November 13, 1943, when a written agreement was executed for the outright sale of the land by Mek to Salim for a consideration of $40 duly incurred by Mek. (See Ex. P3 and P4). Salim died without obtaining a registrable transfer from Mek. The agreement is admitted by the defendant. In short, the title deed to the said land has been in the possession of the plaintiff immediately after her husband's death until Mek executed the agreement with her in 1948 (Ex. P2) and thereafter until today.

(3) The plaintiff has all along been paying the quit rents on the said land.

The only dispute by the defendant was that the sum of $150 stated in the agreement was a loan from the plaintiff to her mother and not an agreement for the sale of the land. I cannot accept her evidence for the following reasons: —

(i) she only relied on what she alleged to have been told to her by her mother. She was not present when the agreement was executed in Jitra. The testimony of her two sons did not strengthen her case in any way; the first son was also not present and the second son was too young to know what the transaction was about. Their evidence as a whole was not worth considering as they do not appear to me to be witneses of truth;

(ii) their verbal testimony contradicts the written agreement on a vital point and is therefore inadmissible under section 92 of the Evidence Act, 1950;

(iii) the agreement speaks for itself in clear and unambiguous terms.

The defendant's contention is therefore wrong. The sum of $150 was payment for the sale of the said land and utilised by Mek to settle the debts incurred by her, as administratrix, for the expenses relating to the

funeral of her late husband and for taking out letters of administration of his estate. The agreement clearly indicates a prior verbal agreement having been made with the plaintiff in 1941 and is in fact a confirmation of that agreement. It also points to the *bona fide* conduct of the plaintiff all through for she could have acted on the first agreement between Salim and Mek, if she wanted to, instead of entering into another agreement and paying a larger sum. The whole issue now depends on section 45 of the Enactment which states: —

"An administrator has power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under section 40, provided that he shall not charge or transfer by sale, gift, exchange or otherwise any immovable property for the time being vested in him without first obtaining the permission of the court by which the letters of administration were granted."

The question is whether the court ought to grant permission in the circumstances so that a registrable transfer by sale be made in favour of the plaintiff.

As a general principle it was held by the Court of Appeal in *Haji Saud* v. *Haji Ahmad & Anor.*[1] that an administrator can enter into an agreement for the sale of immovable property but the agreement is unenforceable unless the permission of the court is obtained. The High Court is empowered in cases of this kind to give the permission required under the section and if permission is not given, the Court of Appeal is empowered to do so. That was a similar case in which specific performance was prayed for and allowed. The appellant as administrator of the estate made an agreement in the presence of beneficiaries for sale of land comprised in the estate. The purchase price was paid and distributed amongst the beneficiaries. The title deed was handed to the first respondent and the two other respondents were put in possession of the land and were still in possession. The administrator took no steps to register the respondents (the purchasers) as owners of the land and in consequence the proceedings were commenced.

Similarly in a much earlier case in the Court of Appeal, *Haji Osman bin Abu Bakar* v. *Saiyed Noor bin Saiyed Mohamed,*[2] which was applied in *Haji Saud's* case, *supra,* the transfer of land was executed by the proprietor of land who died before it was presented for registration. Both the documents of title and the transfer were handed to the purchaser who subsequently sued the administrator for specific performance. It was held that the death of the proprietor-transferor of land did not avoid contract; the legal personal representative of such deceased person was trustee for the purchaser who, subject to the terms of the contract and in the absence of fraud, misrepresentation or mistake, was entitled to the land and to possession.

The present case may be distinguished from the above in that it was the administratrix and not the registered proprietor who was the vendor. It is similar to *Haji Saud's* case, *supra,* except that in the latter case consent of the beneficiaries was obtained and the purchase money was distributed among them.

It was contended that consent of the defendant who was entitled to a larger share of the deceased's property than Mek was never obtained when the agreement (P3) was executed and therefore contravened section 45. The section does not require such consent. All it says is that permission of the court has to be obtained if a transfer of the said land is to be made. It is, in my view, for the court to consider whether such consent was necessary. In the circumstances, it is my considered judgment that the defendant's consent was not necessary. If at all it was necessary, her acquiescence to the transaction can safely be implied from the nature of her weak denial and her unsuccessful attempt to conceal the truth. They lead to the irresistible conclusion that she knew all along the true nature of the agreement and yet did not raise any objection when her mother executed it.

Section 31 of the Enactment seems to be the only provision which by implication requires consent of the beneficiary. It provides for the distribution of the estate of a deceased person in any way upon which all the heirs shall have agreed. Distribution is generally made by the administrator on the residue of the property (if any) according to section 47 after the collection and payment of debts due to and from the deceased in the order as provided by sections 49, 50 and 52 of the Enactment. Apparently, the estate of the deceased in the present case was just sufficient to pay for funeral expenses and expenses for taking out letters of administration according to what is stated in the agreement. There was therefore no residue for distribution to the beneficiaries, *viz.* the defendant, Mek herself and even to the Baitulmal. There was nothing to indicate that Mek had done anything to benefit herself or to prejudice the interest of the beneficiaries, which includes herself. (See section 48). It was never suggested that the sale price of $150 for the said land to the plaintiff was undervalued. The price seems to me to be fair and reasonable at the time of the transaction in 1948. It is three times more than the estimated value made by the defendant subsequently when she applied for letters of administration in 1963. In the circumstances it is my considered judgment that consent of the defendant was not necessary. Taking into consideration the facts and surrounding circumstances of this case, and having regard to the long period of uninterrupted possession by the plaintiff, not to mention her father-in-law and husband before her, not only of the said land and enjoyment thereof but also of the document of title and the payment of the quit rents, I hold that this court ought to and must grant permission for the transfer of the grant of title to be registered in the name of the plaintiff. To hold otherwise would, in my considered judgment, tend to overset a great deal of property in this State, where parties often continue to hold under similar contracts for 40 or 50 years without clothing it with a legal title.

I also hold that neither section 17 of the Specific Relief (Malay States) Ordinance, 1950, nor section 22 of the Limitation Enactment No. 60 (Kedah) arise in the circumstances of this case. Further, the plaintiff's delay in bringing action for specific performance cannot be taken against her. She is in a sense the equitable owner of the said land and so long as she is in possession of the land she does not lose her right simply by not proceeding at once for specific performance; (see *Williams* v. *Greatrex*[3]) the more so in the absence of unfair or unequal dealing and on other relevant circumstances of this case.

I also hold that on the execution of the said agreement and the passing of the title deed and possession of the said land to the plaintiff, Mek became in equity a trustee for the plaintiff as soon as the purchase price had been paid. The principle applies also in jurisdictions where there is registrable title. (Per Suffian F.J. (as he then was) in *Peninsular Land Development Sdn. Bhd.* v. *K. Ahmad*[4]). Subsequently on Mek's death when the defendant was appointed administratrix of the estate she too became a trustee for the plaintiff.

Accordingly I give judgment for the plaintiff with costs. I order specific performance of the said agreement in that a proper transfer be made and to have the title to the land registered in the plaintiff's name as the legal owner and in default the Assistant Registrar be empowered to execute the transfer. Since the defendant had paid the sum of $22 for the share of the Baitulmal, I order the plaintiff to refund the sum to the defendant forthwith. I also order the plaintiff to pay all the expenses incurred by the defendant in taking out letters of administration, the account thereof to be submitted to the Assistant Registrar for the purpose of determining the amount.

I do not consider the plaintiff is entitled to damages.

The defendant's counterclaim is dismissed with costs.

Order accordingly.

Solicitors: *Jayadeva & Zahir; A. S. C. Hoe.*

WEE BING PO v. DAYANG ANAK NGIPA

[O.C.J. (Tan Chiaw Thong J.) January 18, 1974]
[Sibu — Civil Suit No. 9 of 1973]

Practice and Procedure — Res judicata — Cause of action estoppel — Previous judgment — Same memorandum of sublease — Payment of monies — Meaning of expression "cause of action" — Further and other relief — Identity of suits — Whether action frivolous or vexatious.

This was the second action between the parties. An earlier action between them was founded on the breach of a purported memorandum of sublease. The defendant in this second action alleged that (1) the plaintiff was basing his present action on the same cause of action as that in the earlier one and that since particularly a prayer was included in the earlier action for "further or other relief" and the earlier judgment made no order thereon, that judgment having been made in respect of the same cause of action, the plaintiff was estopped from bringing the present action, (2) the present claim fell within the residual prayer made in the earlier action and what the plaintiff should have done was to appeal against the earlier judgment, (3) further the same issue relating to the monthly payments was raised and disposed of in the earlier action, and because of the earlier judgment, the plaintiff was estopped from raising the same issue again.

The same memorandum of sublease was also pleaded in the second action.

Held: (1) the court in circumstances such as these will look at the pleadings in both actions and the judgment in the earlier action;

(2) the cause of action in the second action arose when the earlier court decided that the memorandum of sublease was null and void. The claim was founded on a total failure of consideration from the defendant and the claim was for the recovery of money had and received by the defendant. The cause of action in each of the two actions was distinct and not the same;

(3) the residual relief namely "further or other relief" prayed for in the earlier action had reference to the main reliefs asked for and could not have reference to the present cause of action;

(4) the evidence required to support the second action was different from that raised in the earlier action, and there was therefore no identity of suits. The action was therefore not frivolous or vexatious and an abuse of the process of court.

Cases referred to:-

(1) *Fidelitas Shipping Co. Ltd.* v. *V/O Exportchleb* [1966] 1 Q.B. 630, 640.
(2) *Ball* v. *Holmes* [1956] 1 W.L.R. 1359, 1366.
(3) *Lee Sem Yoong* v. *Leong Yoong* [1967] 2 M.L.J. 86, 88.
(4) *Nasri* v. *Mesah* [1971] 1 M.L.J. 32.
(5) *Derrick* v. *Williams* [1939] 2 All E.R. 559, 566.
(6) *In re May* (1885) 28 Ch. D. 516.
(7) *Henderson* v. *Henderson* (1843) Hare 100, 115; 67 E.R. 319.
(8) *Brunsden* v. *Humphrey* (1884) 14 Q.B.D. 141, 146.
(9) *Greenhalgh* v. *Mallard* [1947] 2 All E.R. 255.
(10) *Public Trustee* v. *Kenward* [1967] 1 W.L.R. 1062.
(11) *Hunter* v. *Steward* (1861) 4 De G.F. & J. 168, 178.

CIVIL SUIT.

David Tiong for the plaintiff.

Ting Tung Ming for the defendant.

Tan Chiaw Thong J.: As a preliminary point, the defendant has raised the objection that the plaintiff is estopped from taking these proceedings on the ground of the operation of the doctrine of *res judicata.* The plaintiff does not object to this matter being tried as a preliminary issue.

This point has been pleaded as an alternative defence by the defendant in paragraphs 19 and 20 of the defence, which read as follows: —

"(19) Alternatively, the defendant contends and will contend at the trial of this action that the plaintiff is on the doctrine of *res judicata* estopped from claiming for a judgment against the defendant for payment of the sum of $3,240.00 or any other relief.

Particulars

In Civil Suit No. 48 of 1971 brought by the plaintiff against the present defendant and Ajah anak Rawan (f) based on the same cause of action which was tried on 15th June, 1972 the Honourable Mr. Justice George K.S. Seah dismissed the plaintiff's claim for specific performance or any other relief.

(20) The defendant contends that the plaintiff's claim is misconceived and should be dismissed with costs to the defendant." (See also paragraphs 15 and 16 of that defence).

The defendant pleads that, because in the judgment in Civil Suit No. 48 of 1971 between the present plaintiff and the present defendant and one Ajah anak Rawan (f), the plaintiff is prevented by the doctrine of *res judicata* from bringing another action based on the same cause of action. In other words, the defendant is pleading "cause of action estoppel" in this case. As Denning M.R. put it in *Fidelitas Shipping Co. Ltd.* v. *V/O Exportchleb*[1] at page 640: " . . . if one party brings an action against another for a particular cause and judgment is given upon it, there is a strict rule of law that he cannot bring another action against the same party for the same cause . . ."

In Civil Suit No. 48 of 1971, the plaintiff's respective claims against both defendants were based on the same cause of action.